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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

KENNETH SCHAPIRO, Plaintiff and Appellant, v. MORGAN CREEK PRODUCTIONS, INC. et al., Defendants and Respondents.	B146184 (Los Angeles County Super. Ct. No. BC 195065)

APPEAL from a judgment of the Superior Court of Los Angeles County. David L. Minning, Judge. Reversed.

Proskauer Rose, Bert H. Deixler, Michael H. Weiss and Jennifer M. Crome for Plaintiff and Appellant.

Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, Patricia L. Glaser, Theresa J. Macellaro and R. Paul Katrinak for Defendants and Respondents.

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In April 2000, the law firm of McCambridge, Deixler and Marmaro, LLP (McCambridge) merged into the law firm of Proskauer Rose LLP (Proskauer). At that time, Bert H. Deixler of McCambridge was counsel of record for Kenneth Schapiro in this action against Morgan Creek Productions, Inc., Morgan Creek International and James G. Robinson, the chief executive officer and chairman of the board of both entities.[1] More than six months later and less than 30 days before the date set for trial, defendants moved to disqualify Proskauer and Deixler from representing Schapiro. They claimed that because Proskauer represented Morgan Creek before the McCambridge merger in matters "substantially related" to Schapiro's action, Proskauer and Deixler were deemed to have received confidential information germane to the Schapiro action.

Schapiro appeals from the order disqualifying Deixler and Proskauer. He contends that (1) the trial court misapplied the "substantial relationship" test by automatically presuming that confidential information was shared between Proskauer attorneys who had represented Morgan Creek and the attorneys representing Schapiro instead of conducting the more detailed analysis called for by *H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, (2) the evidence failed to demonstrate a "substantial relationship" between Proskauer's former representation of Morgan Creek and the Schapiro matter, and (3) the trial court's consideration of ex parte evidence was improper.

Because we find insufficient evidence to justify disqualification, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. Schapiro's Complaint Against Morgan Creek and Robinson

In July 1998, Deixler, a partner at McCambridge, filed a complaint on Schapiro's behalf against defendants alleging causes of action for breach of contract, false promise

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[1] We refer to Morgan Creek Productions, Inc. and Morgan Creek International collectively as "Morgan Creek" and to "Morgan Creek" and Robinson collectively as "defendants."

and violation of Labor Code section 227.3. Shapiro alleged as follows: Morgan Creek employed Schapiro from 1990 to 1997. An employment agreement effective January 1, 1995, named Schapiro executive vice president of Morgan Creek. It promised him a company sale bonus if all, or substantially all, of Morgan Creek's assets were sold prior to December 31, 1997 and if he did not receive the sale bonus during the term of his contract, promised him an "appreciation right" of one percent of the appreciation of the company between January 1, 1995 and December 31, 1997. Schapiro was also promised "'annual performance based bonuses.'" Although the contract term was through December 31, 1997, either party could terminate as of December 31, 1996 on written notice.

In September 1996, the contract was modified to induce Schapiro not to exercise his option to terminate. Schapiro gave up the right to terminate the agreement, his sale bonus and the appreciation right, in return for which he was to receive a $500,000 term bonus payable no later than January 31, 1998 if his employment was not terminated for cause prior to December 31, 1997. The terms of the amendment were memorialized in a memorandum initialed by Gary Barber, Morgan Creek's chief operating officer, and Robinson.

In July 1997, Barber left Morgan Creek and Drew Larner was hired as his replacement. Without informing Schapiro in advance, Morgan Creek publicly announced that Larner had taken over as "'point man at major film and TV markets,' i.e. Schapiro's position." In August Schapiro wrote to Robinson that these actions were inconsistent with his agreement, that he was ready, willing and able to perform under his contract until the end of its term, but that it was clear that it had been determined that he did not fit within Morgan Creek's plans for the future, and that he would like to amicably discuss settlement of his contract. In December, Schapiro again wrote to Robinson that his contract would expire on December 31, 1997 and that he would be leaving Morgan Creek. He requested payment of his $500,000 term bonus, his December 1997 salary and four unused accrued vacation days.

Schapiro alleged that Morgan Creek breached his employment agreement by failing to pay his performance bonus for 1997 and failing to pay the $500,000 term bonus. He alleged that the amendment to the contract was induced by fraud since defendants had no intention of performing it, and the delay in paying the four accrued vacation days violated the Labor Code.

B. Morgan Creek's Cross-complaint Against Schapiro

In August 1998, Morgan Creek, represented by Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro (Christensen), filed a cross-complaint against Schapiro for "intentional prima facie tort"[2] and breach of contract, alleging that after Barber left Morgan Creek, Schapiro refused to cooperate with new management, cut back his hours, took unauthorized time off, and refused to attend meetings after five o'clock. It also alleged that Schapiro breached the covenant of good faith and fair dealing and confidentiality provision by attaching a copy of the agreement to the complaint.

C. The Motion to Disqualify

On April 1, 2000, McCambridge merged with Proskauer. On October 25, 2000, less than 30 days before the scheduled trial date, defendants filed a motion to disqualify Proskauer and Deixler. Morgan Creek supported its motion with declarations of Theresa J. Macellaro, attorney with the Christensen firm, Howard Kaplan, chief financial officer of Morgan Creek Productions, Inc. and James G. Robinson. Morgan Creek also submitted plaintiff's deposition testimony and interrogatory answers.

In opposition to the motion, Schapiro submitted the declarations of Deixler and Melissa Burns, Deixler's cocounsel, who worked with Deixler at McCambridge as well as at Proskauer on the case.

The hearing on the motion continued over five different days. Two additional declarations of Howard Kaplan were filed on behalf of defendants. Plaintiff filed

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[2] The "intentional prima facie tort" cause of action was dismissed on a motion for judgment on the pleadings.

declarations by Scott J. Witlin and Bernard D. Gold, two Proskauer attorneys. The court reviewed copies of all billing statements from Proskauer to Morgan Creek from September 26, 1988 through March 10, 1999 in camera. The court also conducted a hearing in camera to review the Proskauer files with respect to its work for Morgan Creek. Deixler objected to the in camera consideration of evidence. He declined to be present to avoid the risk of conflict and on the court's suggestion a Proskauer partner who had nothing to do with the litigation or Morgan Creek attended on Proskauer's behalf on the condition that no information from the hearing would be transmitted to Deixler or Burns, or anyone at Proskauer working on the Schapiro matter.

The evidence before the court was as follows:

Proskauer did legal work for Morgan Creek from September 1988 through March 10, 1999. Although the billing statements from Proskauer to Morgan Creek identified the names of 11 lawyers who performed legal services, the overwhelming majority of the work was done by attorney Howard Fabrick. The legal work involved advising Morgan Creek on movie production labor and union issues, in general, and on specific labor issues with respect to personnel that arose during the production of particular films.

In 1988 and 1989, Proskauer billed Morgan Creek approximately $15,000 for legal services relating to an injunction, pension contributions, and labor issues on a particular film. In 1990 Proskauer billed about $40,000 for legal services primarily relating to two films. After that there was no work until 1995 when Morgan Creek was billed approximately $2,500 primarily for work involving an arbitration. Proskauer attorneys Scott Witlin and Bernard Gold did that work. The next work was performed between August 1998 and January 1999 for which approximately $35,000 was billed, primarily for work on a particular film. All of the work during that period was performed by Howard Fabrick, except one quarter of an hour by Scott Witlin on a Writers Guild issue and one-half hour by Bernard Gold for research on force majeure provisions for stuntmen. The last day on which services for that period were performed was January 27, 1999. At the end of January 1999 Howard Fabrick, the principal attorney for Morgan

Creek, left the Proskauer firm and there was no further work done by any Proskauer lawyers for Morgan Creek after that time.

More than a year later, in April 2000, McCambridge merged with Proskauer. The merger was announced in the Daily Journal, Daily Variety and other publications. The Schapiro lawsuit which had been filed in July 1998 became a Proskauer case. As the litigation continued between April and October 2000, numerous communications were exchanged between defendants' counsel and plaintiff's counsel now at Proskauer on Proskauer letterhead, and all Schapiro pleadings after April were filed under the Proskauer name. Proskauer did not serve or file a notice of substitution as required by Code of Civil Procedure section 285.

According to Kaplan, he first learned of Proskauer's representation on October 20, 2000 when he attended Robinson's deposition at the Proskauer offices. He immediately informed Morgan Creek's attorney that Proskauer had represented Morgan Creek for over 10 years and had a "wealth of confidential and attorney-client information related to Morgan Creek labor matters."

According to Deixler and Burns, neither attorney had ever met or spoken with Howard Fabrick. Deixler and Burns had never discussed the merits or defenses of the Schapiro lawsuit with anyone at Proskauer except the McCambridge colleagues and had obtained no information relating to the lawsuit or Morgan Creek from Proskauer. Neither lawyer was aware that Proskauer had represented Morgan Creek until the issue was raised in October 2000.

Defendants' motion for disqualification was based on the assertion that there was a substantial relationship between Proskauer's former representation of Morgan Creek and this lawsuit because Proskauer had advised Morgan Creek on labor issues, and the Schapiro lawsuit involved labor issues.

Schapiro argued that there was no substantial relationship between the earlier representation by Proskauer and the present case. He also argued that defendants had waived the right to assert any conflict by failing to bring the motion earlier.

The trial court granted the motion. Relying on *River West, Inc. v. Nickel* (1987) 188 Cal.App.3d 1297, 1303 (*River West*), it found Proskauer's prior representation substantially related to its representation of Schapiro. This was based on Schapiro's intention to introduce the testimony of certain former Morgan Creek executives who did not have contracts signed by Robinson as rebuttal evidence if Morgan Creek introduced evidence that all executive employment agreements had to be signed by Robinson. The court also found that defendants had not waived their right to assert any conflict although it did state it was "concerned with the timing of Morgan Creek's motion to disqualify . . . ."

APPEALABILITY

An order granting the motion to disqualify was entered on November 15, 2000 and a timely notice of appeal from it was filed the following day. An order disqualifying a law firm from further representing a client is appealable as a final order upon a collateral matter. (*Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4th 109, 111, fn. 1.)

STANDARD OF APPELLATE REVIEW

Whether an attorney should be disqualified is addressed to the sound discretion of the trial court. (*Comden v. Superior Court* (1978) 20 Cal.3d 906, 915-916; *Henriksen v. Great American Savings & Loan, supra,* 11 Cal.App.4th at p. 113.) "In exercising that discretion, the trial court is required to make a reasoned judgment which complies with the legal principles and policies applicable to the issue at hand." (*Henriksen, supra,* at p. 113.) In reviewing disqualification motions, the judgment of the lower court is presumed correct and all intendments and presumptions are indulged to support it on matters as to which the record is silent. (*Ahmanson, supra*, 229 Cal.App.3d at p. 1451.) Conflicts in the declarations are resolved in favor of the prevailing party and the trial

court's resolution of factual issues arising from competing declarations is conclusive on the reviewing court. (*Ibid.*) "Nevertheless, because of the importance of motions to disqualify counsel, appellate courts must carefully review the trial court's exercise of discretion." (*River West, supra*, 188 Cal.App.3d at p. 1302.)

DISCUSSION

A. Defendants Failed to Establish a "Substantial Relationship" Between Proskauer's Prior Representation of Morgan Creek and This Action.

Rules of Professional Conduct, rule 3-310 provides in part: "(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member had obtained confidential information material to the employment." This rule implements the ethical imperative of Business and Professions Code section 6068, subdivision (e), which states that it is the obligation of every attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

A former client may seek to disqualify a former attorney from representing an adverse party by showing that the attorney has confidential information adverse to the former client. (*Henriksen v. Great American Savings & Loan, supra*, 11 Cal.App.4th at p. 113.) Where such information has been obtained and the former client has not consented to the current representation, disqualification follows as a matter of course without balancing equities. (*Ahmanson, supra*, 229 Cal.App.3d at p. 1451.)

But actual possession of confidential information is not necessary in order for a former client to be able to disqualify the former attorney from representing an adverse party. If the former client can establish the existence of a "substantial relationship" between the former representation and the current, it is conclusively presumed that the attorney possesses confidential information adverse to the former client. (*Ahmanson, supra*, 229 Cal.App.3d at p. 1452; *River West, supra*, 188 Cal.App.3d at p. 1303.) "'This

is the rule by necessity, for it is not within the power of the former client to prove what is in the mind of the attorney. Nor should the attorney have to "engage in a subtle evaluation of the extent to which he acquired relevant information in the first representation of the actual use of that knowledge and information in the subsequent representation."'" (*River West, supra*, at p.1304.)

The "substantial relationship" test was first announced in *T.C. & Theatre Corp. v. Warner Bros. Pictures* (S.D.N.Y. 1953) 113 F. Supp. 265, 268 and adopted in California in *Global Van Lines, Inc. v. Superior Court* (1983) 144 Cal.App.3d 483, 489. Although this test is the focal point in determining attorney disqualification, the standard did not receive much critical scrutiny until the *Ahmanson* case. (*Rosenfeld Construction Co. v. Superior Court* (1991) 235 Cal.App.3d 566, 576.)

Ahmanson recognized that although the substantial relationship test was generally accepted as an appropriate prophylactic approach to disqualification, there were considerable drawbacks in applying the test. These included that (1) it is overinclusive, (2) it may work a substantial hardship on the current client, (3) it may unfairly limit attorneys' employment opportunities, (4) it may stifle development of expertise in complex areas of law, and (5) it can be used for purely strategic purposes to delay litigation and harass the opposing party. (*Ahmanson,* supra, 229 Cal.App.3d at pp. 1453-1454.)[3] *Ahmanson* provides an analytical framework to determine whether a "substantial relationship" exists, while seeking to minimize the effects of these drawbacks.

The court observed that both parts of the test are susceptible to a variety of meanings and interpretations. "The word 'substantial' . . . is subject to a variety of interpretations. The word 'relationship' implies a connection, but offers no guidance as to what is being connected: subject matters, facts, or issues." (*Ahmanson, supra,* 229

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[3] "[M]otions to disqualify counsel . . . can be misused to harass opposing counsel [citation], to delay the litigation [citation], . . . to intimidate an adversary into accepting settlement on terms that would not otherwise be acceptable [citations] [and] 'for purely strategic purposes . . . .' [Citations.]" (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 300-301, fns. omitted.)

Cal.App.3d at p. 1453.) But the rule followed in California with respect to the conclusive presumption that an attorney possesses confidences that could prejudice a former client "is that the attorney's possession of confidential information will be presumed only when '"a substantial relationship has been shown to exist between the former representation and the current representation, *and* when it appears by virtue of the nature of the former representation or the relationship of the attorney to his former client confidential information material to the current dispute would normally have been imparted to the attorney . . . ."' [Citations.]" (*Id*. at p. 1454, italics added.)

A*hmanson* adopted the analysis suggested by Judge Adams in his concurring opinion in *Silver Chrysler Plymouth, Inc. v. Chrysler Mot. Corp*. (2d Cir. 1975) 518 F.2d 751, 760: To determine whether the former representation would normally result in disclosure of confidential information germane to the current action the court should "'focus on the similarities between the two factual situations, the legal questions posed, and the nature and extent of the attorney's involvement with the cases. As part of its review, the court should examine the time spent by the attorney on the earlier cases, the type of work performed, and the attorney's possible exposure to formulation of policy or strategy.' [Citation.]" (*Ahmanson, supra,* 229 Cal.App.3d at p. 1455; see also *Rosenfeld Construction Co. v. Superior Court, supra*, 235 Cal.App.3d at p. 576; *Adams v. Aerojet-General Corp*. (2001) 86 Cal.App.4th 1324, 1332; *In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556, 563.)

The trial court here failed to conduct the analysis called for by *Ahmanson*. Its order granting the motion to disqualify neither cited to *Ahmanson* nor made findings consistent with it. It concluded that simply because Morgan Creek executives who had contact with Proskauer in the course of its prior representation would likely be called as rebuttal witnesses in the Schapiro action, the prior representation was "substantially related" to the Schapiro lawsuit. It did not evaluate the subject of the prior contacts with the executives, the specific facts or legal issues involved in Proskauer's prior representation or assess if they would normally have required the divulgence of relevant confidential information.

Even if the trial court had applied the *Ahmanson* analysis to the evidence, we conclude it still could not have properly disqualified Proskauer and Deixler. Morgan's Creek's evidence of "substantial relationship" consisted of (1) evidence that Proskauer had rendered legal services for Morgan Creek over a 10-year period, (2) general statements by Kaplan that Proskauer's previous representation related to labor relations and employee contracts, (3) Schapiro's assertion that he intended to introduce evidence of Morgan Creek's policy of violating labor laws, (4) evidence that Proskauer had 18 telephone calls and five letters to Klubeck who was identified in Schapiro's answers to interrogatories as having information germane to Schapiro's lawsuit, (5) evidence that other persons so identified in Schapiro's interrogatory answers had also been contacted by Proskauer during its previous representation of Morgan Creek, and (6) conclusory statements by Kaplan that Proskauer's prior representation was not limited to simple union disputes. The evidence Morgan Creek submitted in camera included reference to several specific matters previously handled by Proskauer with general statements as to the nature of each matter. But it failed to identify the specific facts and legal issues involved that would permit the conclusion that confidential information relevant to Schapiro's representation would normally have been revealed.

Morgan Creek introduced no evidence of any prior representation by Proskauer related to Schapiro's agreement. There was no evidence that Proskauer's previous representation included legal or factual issues related to oral employment agreements or oral amendments to written agreements. While establishing that persons with knowledge related to the Schapiro lawsuit had previously had contact with Proskauer, Morgan Creek introduced no evidence of the subject of those communications that would justify a determination that those communications would normally have required the divulgence of information germane to the Schapiro action.

Defendants were concerned that a former Morgan Creek employee, Rich Klubeck, who was listed by Schapiro as a witness in this case, had been involved in legal matters in which Proskauer had provided legal advice. But Deixler represented to the court that he

had never interviewed, deposed or had any contact with Klubeck and would not call him as a witness.

Although Schapiro had earlier asserted an intention to prove a company policy on the part of Morgan Creek to violate the Labor Code, Deixler represented that the evidence with respect to Labor Code violations would be limited to Schapiro, his application and the manner in which it was handled and paid, and that witnesses would be carefully prepared not to talk about labor practices.

As the trial court observed, there was no evidence Proskauer's prior representation related to "employer-employee contracts dealing with Morgan Creek handling of employment contracts." Morgan Creek made no effort to specifically point out the nature of the legal and factual issues involved in the matters described in the in camera portions of Kaplan's declarations.

Morgan Creek's characterization of Proskauer's previous representation by such generic terms as "labor issues" or "employee issues" is no substitute for analysis to determine if the issues were truly related. Depending on the generality of the characterization, virtually any two matters can appear to be related. The Schapiro action is essentially a contract dispute turning upon the specific terms of Schapiro's agreement with Morgan Creek and the facts relating to the alleged modification of that agreement. A key issue in the litigation is whether Morgan Creek had a policy that amendments to employment agreements could only be effective when signed by Robinson. While Morgan Creek points to the fact that Schapiro intended to introduce rebuttal evidence by Morgan Creek executives that they operated without written contracts, Morgan Creek has provided no evidence that links this testimony to Proskauer's prior representation.

Reviewing the involvement of the attorneys in the prior representation further supports our conclusion. Proskauer's representation over the 10 years can be described as sporadic, at best. Our review of the record, including the billing statements produced in camera, reveals that the overwhelming majority of the legal services rendered by Proskauer related to issues arising in conjunction with the production of specific films. While its representation of Morgan Creek may have touched on other issues, no evidence

was introduced establishing that those other issues made the revelation of confidential information relevant to Schapiro's lawsuit likely. Moreover, Fabrick, who was clearly Morgan Creek's principal attorney at Proskauer, left that firm in January 1999, more than a year and a quarter before MDM merged with Proskauer. Morgan Creek did not use Proskauer's services after his departure.

Defendants expressed concern that two current Proskauer attorneys, Bernard D. Gold and Scott J. Witlin, had provided services to Morgan Creek relating to labor practices. But the evidence established that their work for Morgan Creek was not related to the Schapiro case or issues raised in the Schapiro case.

Gold billed for 14 hours from July 1995 to June 1996. The only other work was the half-hour of research regarding a force majeure provision in the Screen Actors Guild Agreement in November 1998. Gold was not aware that McCambridge attorneys who joined Proskauer had been involved in litigation with Morgan Creek and had not discussed his former representation with them.

Witlin had advised Morgan Creek in the early 1990's regarding union organizing activities in connection with a few films Morgan Creek was producing. He performed no work for Morgan Creek from the early 1990's until the late 1990's when an acquaintance was hired by Morgan Creek and called him no more than three times regarding the interpretation of an industry wide collective bargaining agreement. The only time billed to Morgan Creek between July 1995 and January 1999 was a quarter hour regarding a Writers Guild Agreement and three-quarters of an hour in connection with the Directors Guild contract in August 1995. He did not know former McCambridge attorneys were representing Schapiro against Morgan Creek and had not discussed the substance of any information he learned during his representation of Morgan Creek with them.

The trial court abused its discretion in granting the motion to disqualify because it failed to apply the applicable standard and, in any event, there was insufficient evidence to support a finding of a substantial relationship between Proskauer's prior representation of Morgan Creek and the Schapiro action.

B. Other contentions.

In light of our determination that the court erred in granting disqualification, we need not reach appellant's other claims of error with respect to waiver based on the timing of the motion and due process with respect to the in camera review of evidence.

DISPOSITION

The order granting the motion to disqualify Deixler and Proskauer is reversed. Costs of appeal are awarded to appellant.

NOT FOR PUBLICATION.

_____, J.

TODD

We concur:

_____, P.J.

BOREN

_____, J.

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